OPINION ENTERED: SEPTEMBER 21, 2012

CLAIM NO. 201101331

PRECISION STRIP, INC. PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

JOHN ROGERS
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AFFIRMING

* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and SMITH, Members.

SMITH, Member. Precision Strip, Inc. ("Precision") appeals from the February 28, 2012 Opinion and Order rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") awarding John Rogers ("Rogers") permanent partial disability ("PPD") benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1. Precision also appeals from the March 17, 2012 Opinion and Order on Reconsideration and the April 20, 2012 order denying Precision's motion to enforce a

settlement agreement. On appeal, Precision argues the ALJ erred in enhancing the PPD benefits by the three multiplier and in not enforcing the terms of a post-opinion and award settlement agreed upon by the parties.

Rogers' Form 101 filed October 7, 2011 alleges an injury to his low back occurring on August 2, 2010 when he "bent down to grab a chain to secure a load" and pain "shot through" his left leg and back.

Rogers testified by deposition on December 14, 2011 and at the hearing held February 23, 2012. Rogers, age 37, testified he attended school through the 11th grade and attained a GED. His work history consists mainly of truck driving and operating heavy machinery. He was employed by Precision as an over the road truck driver hauling loads from Bowling Green, Kentucky to cities in Alabama and Tennessee. His job required him to secure the loads inside his trailer with a 40 pound chain. Rogers stated he injured his back on August 2, 2010 when he bent down to pick up a length of chain to secure the load on his truck. He felt a sharp pain in his back, left hip, and left leg. He reported the injury and went home. Roger stated he returned to work that evening and sought medical care the next day at CorpCare where he was treated by Dr. Omkar Bhatt and Dr.

Richard Larson. Dr. Larson obtained an MRI which showed a herniated disc and referred Rogers to Dr. William Schwank.

Rogers testified he cannot return to his work at Precision because he would have difficulty with bending or squatting and lifting. He testified that since the injury he worked as a temporary part-time tanker truck driver for Owen Transport. The position was less strenuous, requiring him to lift only a hose which weighed appproximately ten to fifteen pounds. He currently works as a yard driver for Tractor Supply Company with duties that are much less strenuous.

Rogers testified he wears a brace and continues to suffer from back pain. He testified he can only sit or stand for about 90 minutes. He only takes ibuprofen for pain since the insurance discontinued payment for his medical care.

Dr. Schwank, a neurosurgeon, evaluated Rogers on October 5, 2010, diagnosing degenerative disc disease of the lumbar spine with foraminal stenosis and bulging discs at multiple levels. On November 12, 2010, Dr. Schwank released Rogers to light duty work, noting he had been doing light duty work. On December 13, 2011, he released Rogers to return to work without restrictions. In a January 23, 2012 letter, Dr. Schwank stated, based on his last visit on

January 10, 2012, Rogers' work injury did not result in any permanent impairment.

Dr. David W. Gaw evaluated Rogers on April 20, 2011. Rogers reported low back pain radiating into the left side of his buttocks and down his left leg. Dr. Gaw noted Rogers had no pre-existing difficulties with his back. He diagnosed lumbar degenerative disc disease with non-verifiable left radiculopathy. Based upon the history Rogers provided, he opined the work injury caused the current symptoms. Dr. Gaw stated Rogers reached maximum medical improvement on December 10, 2010. He assessed a 7% impairment pursuant to the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. Gaw stated, with regard to restrictions, "pain is the limiting factor on his activities." He indicated Rogers retained the physical capacity to return to the type of work performed at the time of injury.

Precision submitted the report of Dr. John Stanton who evaluated Rogers on January 20, 2012. Dr. Stanton concluded Rogers' work injury resulted in no permanent impairment. He stated Rogers had pre-existing degenerative changes in his lumbar spine with no evidence of a herniated disc, no evidence of neurologic impairment or radiculopathy and sustained only a muscle strain to his back. He further

opined that ongoing complaints appeared to be due to the bulging disc and degenerative changes but not to the work-related injury. He determined Rogers could return to work but should not lift more than fifty to sixty pounds and should avoid repetitive bending and stooping.

Dr. Stanton noted Rogers had not undergone epidural injections which might improve the crowding of nerves at the neural foramen due to the bulging discs and arthritic changes. He recommended injection therapy to treat Rogers' degenerative changes, but not the work injury.

In his February 28, 2012 Opinion and Order, the ALJ found Rogers sustained an injury as defined by the Act resulting in a 7% functional impairment rating. The ALJ found as follows regarding the application of multipliers:

> **2. Is the plaintiff entitled to any enhancement to his impairment?** Plaintiff argues that he is entitled to at least double multiplier pursuant to KRS 342.730, because he returned to work at a lower wage. The defendant argues that the plaintiff has returned to work and therefore should not receive more than the double multiplier.
>
> The ALJ finds relevant the reasoning in *Fawbush v. Gwinn,* 107 S.W.3d 5 (Ky. 2003). In *Fawbush*, the court held that where both paragraph (c)1 and paragraph (c)2 of KRS 342.730(1) might apply, the ALJ is authorized to determine which provision is more appropriate on the facts. The court concluded that the ALJ was

> authorized to determine which provision was more appropriate on the facts. If the evidence indicates that a worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of injury for the indefinite period, the application of paragraph (c)1 is appropriate 107 S.W.3d at 12.
>
> In the present case, since being terminated by the defendant, the plaintiff has made two attempts to continue working, and he has earned substantially less than he earned working for the defendant. He has demonstrated an inability to sit as long as he sat at his pre-injury job. He cannot lift, bend or squat to the extent necessary to perform his pre-injury job. Although physicians have opined that the plaintiff retains the capacity to perform his pre-injury job, his post-injury work history indicates that if he does retain that capacity, he will not retain it for long.

Precision filed a petition for reconsideration arguing the ALJ erred by applying a Fawbush analysis since Rogers had never returned to work at the same or greater wage following the injury. Precision also sought additional findings of fact concerning the evidence the ALJ relied upon in applying the three multiplier.

In his March 17, 2012 opinion and order on reconsideration, the ALJ provided the following findings:

> 4. Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) and its progeny require an Administrative Law Judge to make three essential findings of fact. First, the ALJ must determine whether a claimant

can return to the type of work performed at the time of injury. Second, the ALJ must also determine whether the claimant has returned to work and [sic] AWW equal to or greater than his pre-injury wage. Third, the ALJ must determine whether the claimant can continue to earn that level of wages for the indefinite future.

5. Mr. Rogers' work history has largely consisted of truck driving and operating heavy machinery. His job with the defendant from 2006–2010 was as an interstate truck driver and required him to secure loads inside his trailer and to throw a 40 pound length of chain up over the cargo.

6. After his work–related back injury on August 2, 2010, Mr. Rogers was treated by a number of physicians, including Dr. Bhatt, Dr. Larson and Dr. Schwank. At the hearing, Mr. Rogers testified without objection that Dr. Schwank ordered him to submit to a lumbar MRI, which showed that he had a herniated disc.

7. Plaintiff filed the medical report of Dr. David Gaw, and stated that his diagnosis of Mr. Rogers' injury consisted of degenerative disc disease with non-verifiable left radiculopathy. Dr. Gaw placed restrictions on Mr. Rogers, stating that pain is the limiting factor on his activities. Finally, Dr. Gaw stated that based upon the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Mr. Rogers will sustain a 7% permanent partial impairment to the whole person based upon the DRE category II on page 384 of the Guides.

8. Mr. Rogers testified that he probably could not return to his pre-

injury job because he would have difficulty bending, squatting and lifting. Since being terminated by the defendant, he has worked at a temporary and less strenuous part–time job as a truck driver for Owen Transport and recently began working as a yard driver for Tractor Supply Company for wages less than he earned at his pre-injury job. His current job requires almost no lifting. He still suffers from back pain, wears a back brace and takes Ibuprofen for back pain almost every day. He does not take prescription pain medication because the workers' compensation insurer discontinued paying for such prescriptions. Mr. Rogers testified that he can only sit or stand for about 90 min. at a time.

9. Based upon the totality of the evidence, both medical and lay, I make a factual determination that the plaintiff cannot return to the type of work which he performed at the time of his work injury on August 2, 2010. Based on the plaintiff's uncontradicted testimony, I make a factual determination that he has not return [sic] to work at an average weekly wage equal to or greater than his pre-injury wage. On the contrary, since being terminated by the defendant, Mr. Rogers has worked at a temporary less strenuous part-time job as a truck driver and recently began working at a lighter job as a yard driver for an average weekly wage substantially less than he earned at the pre-injury job for the defendant. Based upon the totality of the evidence, both medical and lay, I make a factual determination that the plaintiff cannot continue earning wages equal to or exceeding his pre-injury wages for the indefinite future. On the contrary, I make the factual determination that Mr. Rogers [sic] ability to compete for jobs as a truck

> driver and heavy equipment operator in the competitive economy is significantly impaired for the indefinite future due to his August 2, 2010 work injury.
>
> 10. For all of the above reasons, I awarded to Mr. Rogers enhanced permanent partial disability benefits pursuant to KRS 342.730 (1)(c)1.
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> 11. In light of the above findings of fact and conclusions of law, the defendant's Petition for Reconsideration is hereby overruled and denied.

On March 29, 2012, Rogers' counsel filed a Status of Resolution indicating the facts were not necessarily consistent with those stated in the March 17, 2012 order. Counsel stated as follows:

> What happened was this: after His Honor issued his opinion and award, the undersigned received a call from defense counsel. Defense counsel offered $18,000. This amount was rejected. The undersigned did tell counsel for the defendant that John Rogers would take $20,000 in a lump sum to resolve the issue. After the undersigned made that statement to the defense counsel, the defense counsel filed its petition for reconsideration. While the reconsideration was pending, the defense counsel agreed on behalf of his client to pay the $20,000 in a lump sum or [sic] closure of the entire case, save past medicals. No Form 110–I was ever sent to the plaintiff. Plaintiff has not signed, or otherwise intended to sign, a form 110. His honor issued his statement regarding the petition for reconsideration. The opinion and award still stands. It is the intent of the plaintiff, John Rogers, to seek his

benefits according to that opinion and award. As the workers compensation laws in Kentucky require for a settlement a properly executed form 110–I and approval by an administrative law judge before said settlement has legal effect, there is no settlement. If the defense truly desire [sic] to compromise the case for $20,000 as indicated, there would have been no petition for reconsideration filed, and a form 110 – I would have been promptly presented prior to entertainment of that petition for reconsideration.

As cases are like battlefields, they are fluid in nature. As his honor has upheld the original decision, the status and value of the claim has changed. The plaintiff should not be denied benefits to which he is entitled through legal manipulations of counsel for either the plaintiff or defendant. While the undersigned cannot get into the mind of the defense in this matter, if his honor decided to change his original opinion and award, how are we to know that the defense counsel would have ever produced a form 110 – I for the subject $20,000 in a lump sum? As the proof is in the pudding, we looked down and our spoons are empty. This is not to be accusatory of Mr. Gannon, as the undersigned has worked with Mr. Gannon in the past and found him to be a very pleasant and effective opponent. Nevertheless, the undersigned's first duty is to his client, and not to the wishes and desires of the defense. As such, as far as the plaintiff is concerned, there is no settlement and any attempts to enforce the same should be of no effect.

Having said all that, the status of the situation is the plaintiff does not intend to execute any form 110–I based

> upon a $20,000 lump sum award. If the defense files an appeal with the workers compensation board, the workers comp [sic] board overturns this administrative law judge's opinion and award, the plaintiff will entertain the $20,000 in a lump sum at that juncture. The fact that defense counsel failed to provide the form 110–I prior to their presentation of a motion for reconsideration and/or His Honor's reply to the same, is a risk that the defense assumed. There's an old saying about not being able to have your cake and eat it, too.

Precision filed its notice of appeal on March 30, 2012. Also on March 30, 2012 Precision filed a motion to place appeal in abeyance and remand claim to ALJ for ruling on motion to enforce the settlement agreement. In support of its motion, Precision attached letters dated March 13, 2012 addressed to Rogers' counsel. In the first letter, precision stated:

> In follow–up to our telephone conversation of March 12, 2012 this letter will confirm my clients [sic] willingness to offer the lump sum of $18,000 to Mr. Rogers in exchange for a complete dismissal of all of his claims for workers' compensation benefits against Precision Strip. This is inclusive of all future medicals, income benefits, right to reopen and vocational rehabilitation. Any outstanding, work–related, medical bills are not included in this lump sum and would be paid for by the workers' compensation carrier for the employer. When you and I have discussed this claim in the past neither

> of us are aware of any outstanding medical bills.
>
> Please discuss this with Mr. Rogers and provide his response at your earliest convenience. I look forward to hearing from you.

The second letter stated as follows:

> This letter is in follow–up to our second telephone conversation of March 12, 2012 in which you rejected my client's offer of $18,000 for a complete dismissal and reiterated Mr. Rogers' bottom-line offer of $20,000 for a complete dismissal.
>
> In order to end this claim without further litigation my client has given me authority to settle this claim for the lump sum of $20,000 in exchange for a complete dismissal. I will prepare the settlement agreement in the near future and advise ALJ Rudloft's [sic] office that the claim is settled.
>
> If you have any questions at the present time, please do not hesitate to contact me.

Precision attached a March 22, 2012 letter to Rogers' counsel which provided as follows:

> Please find enclosed the settlement agreement I have prepared in the above – styled case. After you and Mr. Rogers have signed the agreement please forward it to ALJ Rudloft [sic] for his approval. When I receive a copy of the agreement approved by ALJ Rudloft [sic] I will ask my client to issue a check to Mr. Rogers in care of yourself in the

> amount of $20,000 pursuant to the terms of our settlement agreement.
>
> If you have any questions at the present time or wish to discuss the language I used in the settlement agreement, please do not hesitate to contact me.

Precision attached a copy of the agreement signed by its counsel with its motion. The agreement provided for a $20,000.00 lump sum consisting of $5,000.00 for a waiver or buyout of all past, present and future income benefits, $10,000.00 for a waiver or buyout of future medical benefits, $1,000.00 for waiver of vocational rehabilitation and $4,000.00 for waiver of right to reopen. The settlement agreement acknowledges the ALJ rendered an opinion in the case on February 28, 2012 and that the ALJ's opinion and order on reconsideration was rendered March 17, 2012.

Precision also attached a fax cover sheet from Rogers' counsel dated March 22, 2012 indicating the fax was received at 13:14 p.m. The cover sheet indicated original documents would follow by Mail. Attached to the cover sheet was a March 22, 2012 letter from Rogers counsel to counsel for Precision stating as follows:

> I wanted to send you a very quick note to tell you that Judge Rudloft [sic] has not changed his opinion in spite of the reconsideration efforts.

> I called my client John Rogers to discuss the situation wherein I told you he would settle for $20,000 in a lump sum; however, we never got the form 110–I so it may all work out anyhow. The point is he stated, “Wes I didn't want to settle for that.” I did have that authority prior to the hearing and I just assumed he would still go for it. So I miss spoke [sic]. In fact, he was quite concerned about the treatment he needs on his back and told me unequivocally today that he intends to go forward with seeking medical treatment and possibly a surgical correction of his ailment.
>
> Do you intend to file an appeal to the work comp board? Please let me know.

In an order rendered April 20, 2012, the ALJ addressed Precisions’ motion to enforce the post opinion settlement agreement. He noted Rogers had responded denying the parties had entered such agreement. The record reveals that on March 21, 2012, the ALJ issued an order indicating Precision’s counsel had called the ALJ's office on March 19, 2012 and stated the case had been settled. The ALJ directed the attorneys to deliver the Form 110 to the ALJ within 10 days and deliver a settlement check to Rogers’ counsel within 15 days.

The ALJ indicated he carefully reviewed the record and determined “there was no settlement agreement, in that the parties did not reach a meeting of the minds.”

On appeal, Precision first argues the ALJ abused his discretion in enhancing benefits by the three multiplier. Precision asserts the ALJ's reliance on Fawbush was misplaced since Rogers has never returned to work at equal or greater wages following the work injury. Precision notes the ALJ, on reconsideration acknowledged there was no return at equal or greater wages, yet he found Rogers could not continue earning wages equal to or exceeding his pre-injury wage for the indefinite future.

Precision contends it appears the sole basis for the application of the three multiplier was Rogers' own subjective and self-serving testimony regarding his pain. Precision argues the ALJ's determination of the claimant's physical capacity must not be based solely on the claimant's testimony. Rather, the determination is ultimately a medical conclusion. Precision argues there is no medical evidence supporting application of the multiplier.

Precision next argues the ALJ erred as a matter of law in not enforcing the terms of the settlement agreement reached after the opinion was rendered. Precision contends it is clear from the pleadings and the correspondence exchanged between counsel which was attached to the pleadings that after the ALJ rendered his opinion and order, counsel for Rogers extended an offer of settlement which was

clearly accepted by Precision's attorney. Precision relies on the two letters it sent to Rogers' counsel on March 13, 2012. The second letter on the same date refers to a telephone conversation between counsel in which Rogers' counsel advised that his client's bottom-line offer was $20,000 for a complete dismissal. Precision argues this offer was clearly accepted in the second March 13, 2012 letter. Precision further contends additional correspondence from Rogers' counsel as well as pleadings from Rogers' counsel clearly contain admissions that the claim was settled no later than March 13, 2012, although the Form 110 settlement agreement was not sent to Rogers' counsel until March 22, 2012.

Precision argues the March 22, 2012 letter from Rogers' attorney indicates there was a settlement agreement. Precision also contends counsel for Rogers admitted in his Status of Resolution there was an actual settlement of the claim. Precision argues the correspondence between the attorneys was sufficient to constitute a memorandum of agreement for purposes of KRS 342.265 (1). Precision argues that, at the very least, Rogers counsel had apparent authority to settle the claim for the lump sum of $20,000 and this offer was accepted by Precision's counsel.

Precision acknowledges the Kentucky Supreme Court has held that, in general express client authority is required for an attorney to enter into a binding settlement agreement. However, as noted in Clark v. Burden, S.W.2d 574 (Ky. 1996) there are exceptions to the general rule. Precision argues if the Board fails to reverse the award of PPD benefits of utilizing the three multiplier, then clearly the interests of the innocent third-party petitioner will be adversely affected in the event the terms of the settlement are not enforced. It notes the monetary value of the ALJ's award with the three multiplier with open medicals is significantly higher than the terms of settlement upon which its counsel agreed on behalf of his client.

Precision contends that, if the Board declines to reverse the ALJ on the application of the three multiplier, it should at the very least enforce the terms of the $20,000 complete dismissal settlement reached between the parties post-opinion and award.

First we address the issue of the multipliers. Since Rogers was successful before the ALJ in establishing his entitlement to the three multiplier, the question on appeal is whether there was substantial evidence to support the ALJ’s finding. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Substantial evidence is defined as

evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

The ALJ was well within his role as fact-finder in basing the award of the three multiplier on Roger's testimony. An ALJ may give weight to a claimant's own testimony regarding his retained physical capacity and occupational disability. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). In numerous cases involving application of the three multiplier, the Board has cited the holding in Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000), which established the claimant's own testimony is competent evidence as to whether the claimant retains the physical capacity to return to the type of work performed at the time of injury. Conversely, it is also within the discretion of the ALJ to dismiss a claimant's testimony and rely, instead, on medical testimony in the record. As fact-finder, the ALJ determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Company v. Tipton, 862 S.W.2d 308, 309 (Ky. 1993); Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329, 330 (Ky. 1997).

Here, Rogers specifically testified he would have difficulty with the bending, squatting and lifting involved with the work at Precision. He also testified he could only sit for about 90 minutes. It is readily apparent this would adversely impact his ability to perform interstate trucking between Kentucky and cities in Tennessee and Alabama. The record contains substantial evidence to support application of the three multiplier and we may not conclude otherwise.

Precision is correct in noting Fawbush has no application to this claim since Rogers never returned to employment at the same or greater wage than that earned at the time of his injury. However, any findings regarding the application of Fawbush is nothing more than harmless error.

Next we find no error in the ALJ's decision not to enforce the terms of the alleged settlement agreement. Settlement agreements are addressed by the Workers' Compensation Act at KRS 342.265, which states in pertinent part:

> (1) If the employee and employer and special fund or any of them reach an agreement conforming to the provisions of this chapter in regard to compensation, a memorandum of the agreement signed by the parties or their representatives shall be filed with the commissioner, and, if

> approved by an administrative law judge, shall be enforceable pursuant to KRS 342.305.

The purpose of the statute is to give the fact-finder an opportunity to pass upon the terms of compensation agreements and protect the interests of the worker. Skaggs v. Wood Mosaic Corp., 428 S.W.2d 617 (Ky. 1968).

The ALJ determined there was no meeting of the minds and, hence no enforceable agreement. There is nothing in the record to indicate Rogers was involved with the post-award settlement negotiations, nor does the record reflect Rogers gave his attorney actual or express authority to offer or accept any post-award settlement. While Rogers' attorney may have had apparent authority to settle the claim, as discussed below apparent authority is insufficient to bind the claimant to the terms of the alleged agreement.

In arguing the agreement is enforceable, Precision relies upon Coalfield Telephone Co. v. Thompson, 113 S.W.3d 178 (Ky. 2003). Therein the issue was whether correspondence between attorneys for the employer and the now deceased claimant constituted a sufficient memorandum of an agreement for benefits within the meaning of the Workers' Compensation Act. At the time of the claimant's death, the agreement had neither been formalized nor signed by the parties or their representatives. The ALJ approved the

agreement as there was no assertion the terms were incomplete.

Here, the facts are much different. Rogers is alive and is opposed to both the waiver of his future medical benefits and the amount of the settlement. He states, and his counsel admits, he did not grant his attorney authority post-award to settle his claim with a waiver of medical benefits. We believe Coalfield Telephone v. Thompson, supra, is simply inapplicable to this claim. The issue here is whether an enforceable agreement between the parties was reached when the claimant contends he did not authorize his attorney to offer settlement with waiver of medical benefits. The Kentucky Supreme Court, in Clark v. Burden, supra, analyzed at length the issue of whether an unauthorized settlement entered into by opposing party's counsel without the client's approval is binding. The Court stated:

> While attorneys have been held to be superior agents (Daugherty v. Runner, Ky. App., 581 S.W.2d 12, 16 (1978)), a firm line of authority holds that with respect to settlement, attorneys are without power to bind their clients. DeLong v. Owsley's Ex'x, 308 Ky. 128, 213 S.W.2d 806 (1948); Fillhardt v. Schmidt, 291 Ky. 668, 165 S.W.2d 155 (1942); Shropshire v. Shropshire, 282 Ky. 211, 138 S.W.2d 340 (1940); Jenkins v. City of Bowling Green, 261 Ky. 679, 88 S.W.2d 692 (1935); Brown v. Bunger,

Ky., 43 S.W. 714 (1897). See also 7 Am.Jur.2d Attorney at Law § 156 (1980), (which discloses that Kentucky case law is consistent with the general rule). These cases contain little reasoning to justify the rule stated, suggesting that the rendering courts regarded the rule as so manifest to be without any need for exposition. While the reasons for the rule take account of the potential effect upon third parties, and while it would be possible to distinguish these cases from the case at bar, the fact remains that the rule is broad and unambiguous. As succinctly stated in Fillhardt:

> The rule is almost universal that an attorney, clothed with no other authority than that arising from his relationship, has no implied power to compromise and settle a client's claim or cause of action except, perhaps, when he is confronted with the emergency and prompt action is necessary to protect the interest of his client without an opportunity for consultation with him.

165 S.W.2d at 160. When this rule is considered alongside disciplinary rules SCR 3.130-1.2(a) and SCR 3.130-1.4(b), we are bound to conclude that in ordinary circumstances, express client authority is required. Without such authority, no enforceable settlement agreement may come into existence. Our recent decision in Farmers Deposit Bank v. Ripato, Ky., 760 S.W.2d 396 (1988), is not to the contrary for it was premised on the active participation by the represented parties in the negotiations. We noted that the

attorney was not discharged until after the compromise had been reached and that the settlement took place under the clients' watchful eyes. Active participation in the particulars of settlement may be deemed to create implied authority. See also Combs' Adm'r v. Virginia Iron, Coal & Coke Co., 236 Ky. 524, 33 S.W.2d 649, 651 (1930), (holding that an unauthorized settlement may be ratified by the client, even by the client's silence; 'It is the client's duty, having knowledge of the settlement, to express his disapproval within a reasonable time').

Notwithstanding the foregoing, we can conceive of circumstances in which the rights of third parties might be substantially and adversely affected by an attorney possessing apparent authority but who lacked actual authority. If such a contention were made, a court of equity would be empowered to fix responsibility where it belonged to prevent injustice. In most circumstances, however, express authority will be required and in the event of a dispute as to whether the client has given settlement authority, the trial court shall summarily decide the facts. In such a proceeding, the attorney-client privilege would not prevent the attorney from testifying as to the client's instructions regarding settlement. SCR 3.130-1.6(b).

In this opinion we have gone to considerable lengths to fully preserve the rights of the client to control the settlement or termination of litigation. At some point, however, the client must be charged with responsibility for having employed an attorney who failed to observe the requirements of fidelity to the

client's wishes. That point, we believe, is when the rights of innocent third parties are adversely affected. It will be necessary to remand the case at bar to the trial court for reconsideration of the prior hearing record and for an additional hearing, if needed. The trial court must determine whether appellant gave her attorney express or actual authority to settle the case for $23,000. If the court finds that such authority was given, the settlement should be enforced. Even if the trial court finds that no such authority was given, if it should also find that appellees were substantially and adversely affected by their reliance upon the purported settlement, enforcement would be appropriate. On failure to find one or the other of the circumstances set forth hereinabove, the court should determine that no settlement came into existence.

We are not unconcerned with the possibility that this decision will alter an essential component of the administration of justice, the settlement of civil lawsuits. We have considered the argument that lawyers must be able to have complete trust in the representations of other lawyers with respect to settlement. We understand that one who is unscrupulous might attempt to gain a negotiating advantage by making, but later disavowing, a settlement offer or acceptance. We are comforted, however, in the knowledge that the vast majority of all Kentucky lawyers are entirely ethical. Regardless of what we say here, those lawyers would not think of settling a case without express client authority and certainly would not attempt to gain an advantage by unscrupulous negotiating tactics.

> Practicing lawyers (and judges) soon learn who among their colleagues lack trustworthiness and deal with them accordingly. In all but the rarest of circumstances, the settlement practices which have heretofore prevailed will continue. (Emphasis added.)

Clark v. Burden, 917 S.W.2d at 576, 577.

As can be gleaned from Clark v. Burden, supra, ordinarily express client authority is required to enforce an agreement. However, if no such authority is given, the agreement may still be enforceable. There must be a balancing between the right of the client not to be bound when his attorney acts without authorization and the rights of third parties who could potentially suffer harm if they relied on the attorney's representations. Based on this reasoning, the Court directed that a settlement agreement will be enforced if the trial court determines the party seeking to avoid enforcement gave his or her attorney express or actual authority to enter into a settlement agreement or, even if no such authority was given, the party seeking enforcement is "substantially and adversely affected" by their reliance on the proposed settlement.

Ordinarily there would not be a binding agreement since KRS 342.265 specifically requires an agreement be executed by the parties or their representatives prior to approval by the ALJ. Neither Rogers nor his attorney executed the

proposed agreement and the attorney indicated his office never received the agreement. Likewise, there is no signed correspondence or memorandum wherein Rogers' attorney accepted the settlement on behalf of his client. Here, the ALJ had already rendered a decision in this claim and it would appear there was no detrimental reliance by Precision since Rogers' counsel repudiated the proposed settlement by letter faxed at 13:14 p.m. on March 22, 2012 and mailed that same day to Precision's counsel, only nine days after Precision's acceptance and on the same date Precision indicates it sent the settlement agreement to Rogers' counsel. Nothing in the record establishes the precise time on March 22, 2012 when the letter and attached agreement were prepared and sent to Rogers' counsel.

Accordingly, the February 28, 2012 Opinion and Order, March 17, 2012 opinion and order on reconsideration and April 20, 2012 order rendered by Hon. William J. Rudloff are **AFFIRMED**.

ALL CONCUR.

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